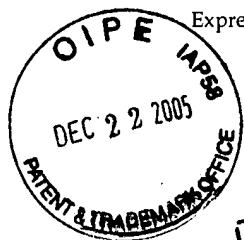


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on

December 22, 2005
  
 Kathy Raymond

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant :	Marcey L. Kelly, et al.	Docket No. :	IL-10707
Serial No. :	09/964,029	Art Unit :	2161
Filed :	09/26/2001	Examiner :	Etienne Pierre Leroux
For :	SOFTWARE DISTRIBUTION SYSTEM		

Honorable Commissioner for Patents

Alexandria, VA 22313-1450

Attention: Board of Patent Appeals and Interferences

Dear Sir:

**APPELLANTS' REPLY BRIEF**

This Reply Brief is submitted in response to the "Examiner's Answer."

The Examiner's Answer was mailed December 8, 2005.

One copy of the Reply Brief is being transmitted per 37 C.F.R. § 41.37.

### THE BARTOLETTI REFERENCE IS NOT AN ENABLING REFERENCE

The statement on page 12 of the Examiner's Answer, "skilled technicians i.e., Tony Bartoletti, Lauri A. Dobbs and Marcey Kelley, consulted conference paper ..... and were thus enabled to further develop the subject matter in order to make the present invention" is inaccurate and is misleading.

Tony Bartoletti, Lauri A. Dobbs and Marcey Kelley are the Applicants in the application being appealed, are the Appellants herein, and are the inventors of the invention of claim 6 on appeal. It is inaccurate and is misleading to imply that the conference paper is "enabling" by characterizing the inventors as skilled technicians that consulted the conference paper.

The Examiner's Answer on page 12, second to the last sentence, states, "Appellant provides no argument why Tony Bartoletti, Lauri A. Dobbs and Marcey Kelley cannot be characterized as skilled technicians ...."

Appellants reply and provide the argument that Tony Bartoletti, Lauri A. Dobbs and Marcey Kelley cannot be characterized as skilled technicians because they are the inventors. The inventors are not simply "skilled technicians that consulted the conference paper." They wrote the conference paper and they conducted the research that resulted in Appellants' invention claimed in claim 6 on appeal.

The law regarding "enablement" is stated on page 113 of *McCarthy's Desk Encyclopedia of Intellectual Property*, "To qualify as prior art, a reference must be enabling.... Prior art under 35 USC 102(b) must sufficiently describe the claimed invention to have placed the public in possession of it..." In re Donohue, 766 F. 2<sup>nd</sup> 531, 266 USPQ 619, 612 (Fed. Cir. 1985) The Bartoletti Reference is a preliminary report by inventors Marcey L. Kelley, Lauri A. Dobbs, and Tony Bartoletti describing problems that were expected to be encountered in a project that was just starting and the approach the inventors intended to use in solving

the problems. The Bartoletti Reference is much shorter than Appellants' patent application and clearly does not include specific elements of claim 6 or the combination of elements of claim 6.

THE EXAMINER'S ANSWER IMPROPERLY INTERPRETED THE  
ELEMENTS OF CLAIM 6 BROADLY

The Examiner's Answer improperly "broadly" interpreted the elements of appealed claim 6. The Examiner's Answer on page 6 stated, "MPEP § 2106 requires Office personnel to give claims their broadest reasonable interpretation in light of the supporting disclosure."

Appellants' claim 6 on appeal was narrowed dramatically during prosecution. Appellants' original claim 6 only included two steps. Appellants' claim 6 on appeal comprises twenty four individual steps. See the comparison of Appellants' original claim 6 with Appellants' appealed claim 6 below.

Original Claim 6

6. A computer-implemented method of secure distribution of vendor's upgrades and patches to client's systems, comprising:

- determining which of vendor's upgrades and patches have been applied to client's systems
- determining which said software upgrades and patches should be or should have been applied to said clients systems.

Claim 6 On Appeal

6. (Previously Presented) A computer-implemented method of secure distribution of vendor's upgrades and vendor's software patch or vendor's software patches to client's systems; wherein the method utilizes such thing as vendors, vendor's ftp sites, system software, files, permissions referenced in the files, ownership of files referenced in the vendors' software patch, needed vendor's software patches, not needed vendor's software patches, directories, operating system type, operating system version, operating system architecture, memory, disk space, other layered products, other patches, and other software upgrades; comprising the steps of:

- determining which of the vendor's software patches should be applied to the client's systems,
- collecting the vendor's software patches from the vendors by downloading them from the vendor's ftp sites,
- interpreting which of the files will be affected by installation of the vendor's software patches,
- interpreting which of the directories will be affected by the installation of the vendor's software patches,
- interpreting the operating system type, version and architecture the vendor's software patches apply to,
- interpreting dependencies on the other layered products,
- determining which of the vendor's upgrades and the vendor's software patches have been applied to the client's systems,
- determining which of the vendor's upgrades and the vendor's software patches should be or should have been applied to the clients systems,
- collection of the vendor's software patches and the vendor's upgrades from the vendors and downloading the vendor's software patches and the vendor's upgrades to the client systems,

**Original Claim 6**

(See Above)

**Claim 6 On Appeal (Continued)**

interpreting the operating system type,  
interpreting the operating system version,  
interpreting the operating system architecture the vendor's software patch applies to,  
determining how much of the memory is needed to install the vendor's software patch and the vendor's upgrades,  
interpreting how much of the memory and of the disk space is needed to install the vendor's upgrades and installing the vendor's software patches,  
determining how dependencies on the other layered products affect the installation of the vendor's software patches and the vendor's upgrades,  
determining how dependencies on the other patches, or the other software upgrades affect the installation of the software patch,  
determining how dependencies on the other software upgrades affect the installation of the vendor's software patch,  
determining which of the files will be affected by the installation of the vendor's software patch,  
determining which of the directories will be affected by the installation of the vendor's software patch,  
backing-out the vendor's software patches that have been applied to the client's systems,  
checking the permissions and the ownership of the files referenced in the vendors' software patch and ensuring that the system software is authentic,  
determining which of the vendor's software patches should be installed by  
determining the needed vendor's software patches and the not needed vendor's software patches,  
distributing the needed vendor's software patches to the client's systems,  
and  
installing the needed vendor's software patches.

Appellants' claim 6 on appeal is an extremely narrow claim and each element should be given weight. The elements of Appellants' original claim 6 were interpreted broadly during prosecution resulting in Appellants' claim 6 on appeal being narrowed dramatically during prosecution. The claim elements of Appellants' narrowed claim 6 on appeal should no longer be interpreted broadly.

The art relating to Appellants' claim 6 on appeal is a crowded art and under the rules of claim interpretation, claims in a crowded art are to be interpreted narrowly. The fact that the art relating to Appellants' claim 6 on appeal is a crowded art is demonstrated by (1) the fact that during prosecution, 15 references were cited and (2) because a patent search for "secure software distribution systems" turns up hundreds of patents.

### APPELLANTS NEED ONLY IDENTIFY A SINGLE MISSING ELEMENT

For Appellants to succeed in this Appeal it is only necessary for Appellants to successfully identify a single "Missing Element."

The Bartoletti et al reference does not disclose the element of claim 6 on appeal, "checking the permissions and the ownership of the files referenced in the vendors' software patch and ensuring that the system software is authentic."

The Examiner's Answer provides three pages of discussion (pages 6-9 of the Examiner's Answer) attempting to argue that this element of claim 6 is disclosed by the Bartoletti et al reference. The Bartoletti et al reference simply does not disclose this element. The Examiner's Answer does not quote any language in the Bartoletti et al reference that discloses this element.

There are other elements of Appellants' claim 6 on appeal that are missing from the Bartoletti et al reference. For example, the following elements are also missing from the Bartoletti et al reference:

"determining which of the vendor's software patches should be installed by determining the needed vendor's software patches and the not needed vendor's software patches," and

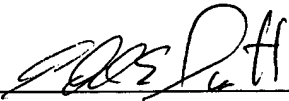
"distributing the needed vendor's software patches to the client's systems."

The Examiner's Answer on pages 9-12 unsuccessfully attempts to argue that these elements are disclosed by the Bartoletti et al reference. If the Bartoletti et al reference included these elements, the Examiner's Answer should have been able to simply and specifically quote the portions of the Bartoletti et al reference that included these elements. Instead, the Examiner's Answer uses four pages of convoluted arguments attempting to establish that these elements are disclosed by the Bartoletti et al reference.

Appellants have shown that the Bartoletti et al reference is a non-enabling reference and that specific elements of claim 6 on appeal are not found in the Bartoletti et al reference. Appellants also point out that the combination of elements of claim 6 on appeal is not found in the Bartoletti et al reference.

It is respectfully requested that claim 6 on appeal be allowed.

Respectfully submitted,

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Date: December 22, 2005